Young's Market Company and Lawrence E. Rodrigues, Petitioner and Sales Drivers, Helpers & Dairy Employees Union, Local 683, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Young's Market Company and Edward Halligan, Petitioner and General Truck Drivers, Office, Food and Warehouse Local 952, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Cases 21-RD-1825 and 21-RD-1826

December 7, 1982

DECISION AND ORDER

By Chairman Van de Water and Members Jenkins and Hunter

On October 2, 1981, Lawrence E. Rodrigues, an individual, filed a petition seeking to decertify Sales Drivers, Helpers & Dairy Employees Union, Local 683, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America¹ as the exclusive collectivebargaining representative of the commissioned salesmen employed by the Employer at its San Diego, California, facility. On October 9, 1981, Edward Halligan, an individual, filed a petition seeking to decertify General Truck Drivers, Office, Food and Warehouse Local 952, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America² as the exclusive collective-bargaining representative of the sales representatives employed by the Employer at its Anaheim, California, facility. On October 29, 1981, the Regional Director for Region 21 administratively dismissed the petition in Case 21-RD-1825, involving the San Diego facility, and on December 7, 1981, the Regional Director for Region 21 administratively dismissed the petition in Case 21-RD-1826, involving the Anaheim facility. The Regional Director found that the units in which decertification elections were sought were inappropriate because they were not coextensive with the recognized multiemployer unit, which included all of the salesmen employed by the Employer at its four facilities. Thereafter, in accordance with the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioners filed timely requests for review of the Regional Director's dimissals of the petitions, contending, inter alia, that factual issues existed which could best be resolved upon the basis of a record developed at a hearing.

The Board concluded that the requests for review raised substantial and material issues which could best be resolved upon the basis of record testimony and, accordingly, on March 5, 1982, reversed the Regional Director's dismissal of the petitions, reinstated the petitions, and directed that a hearing be held on the issues raised. The hearing was held on April 6, 1982, before Hearing Officer Michael A. De Grace. Following the close of the hearing, and pursuant to Section 102.67 of the Board's Rules and Regulations, the Regional Director transferred this proceeding to the Board for decision. Thereafter, the Petitioners, Teamsters Local 683, and Teamsters Local 952 filed briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board finds:

- 1. The Employer, a wholesale liquor distributor, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein
- 2. Teamsters Local 683 and Teamsters Local 952 are labor organizations within the meaning of Section 2(5) of the Act.
- 3. The petitions before us raise no question affecting commerce concerning the representation of certain employees of the Employer, within the meaning of Sections 9(c)(1) and 2(6) and (7) of the Act, for the following reasons:

A. The Positions of the Parties

The Petitioners seek decertification elections among the salesmen at two of the Employer's four facilities. There are about 12 salesmen at the Employer's San Diego facility and about 20 salesmen at the Employer's Anaheim facility. Between September 1, 1977, and August 31, 1981, the salesmen at all four of the Employer's facilities were covered by a collective-bargaining agreement negotiated by a multiemployer association of eight liquor wholesalers, including the Employer, with a group of eight Teamsters locals, including Teamsters Local 683 and Teamsters Local 952. This contract covered a unit of all salesmen employed by the eight members of the multiemployer association. There were about 300 salesmen in this multiemployer unit. The Petitioners contend that, as of October 2 and October 9, 1981, when these petitions

¹ Herein called Teamsters Local 683. The name of Teamsters Local 683 appears as amended at the hearing.

² Herein called Teamsters Local 952.

were filed, the multiemployer bargaining unit had been effectively fragmented and destroyed because separate bargaining had occurred between the unions and a group of four employers not including the Employer. The Petitioners argue that, in the absence of a recognized multiemployer unit, each of the Employer's facilities constitutes a presumptively appropriate single location unit and therefore elections should be directed. Teamsters Local 683 and Teamsters Local 952 contend that at all times relevant to the petitions herein the Employer was a member of a multiemployer association: first, the eight-employer association and, then, a four-employer association. Teamsters Local 683 and Teamsters Local 952 also argue that, even if the multiemployer unit had been fragmented and destroyed, single location units would not be appropriate in light of the Employer's history of recognizing and bargaining with the unions on a companywide multilocation basis as to its salesmen. Therefore, Teamsters Local 683 and Teamsters Local 952 urge that the petitions be dismissed since the units sought are not coextensive with the recognized unit. The Employer has taken no position except to agree with the other parties that, regardless of the scope of the unit found to be appropriate, a unit of salesmen is an appropriate unit.

B. The Facts as to the Multiemployer Unit

Wine and Spirits Wholesalers of Southern California, the multiemployer association to which the Employer belonged until the end of September 1981, has bargained on behalf of its eight members for at least 18 years. Its last contract covering the salesmen was due to expire on August 31, 1981. In June 1981, attorney Neil Papiano informed the Teamsters locals which were parties to this contract that he would be representing four of the eight employers in the upcoming negotiations; the Employer was one of the four specified employers Papiano stated he would be representing. The parties stipulated that Papiano's notice was not a withdrawal by the four employers from the multiemployer association, but rather was merely notification that Papiano would be the spokesman for those four employers during the negotiations. The record reveals that Sidney Korshak, the labor attorney regularly employed by Wine and Spirits Wholesalers of Southern California, was the spokesman for the association during the negotiations and that all eight employer-members of the association contributed their regular share of Korshak's fee.

The negotiations for a new contract apparently began in August 1981. The parties stipulated that, sometime before September 30, 1981, Papiano communicated an offer to the Teamsters locals on behalf of all eight employer-members of the association, which was voted on and rejected by the salesmen employed by all eight employers. The parties also stipulated that, on September 30, 1981, representatives of all eight employers met with the Teamsters locals in negotiations; however, on October 1, 1981, Korshak met with the Teamsters locals along with a Federal mediator and Ernest Wenberg, executive vice president of Wine and Spirits Wholesalers of Southern California, but without Papiano or any official of the four employers he represented in attendance. At this meeting on October 1, 1981, Korshak made a verbal final offer to the Teamsters locals on behalf of Wine and Spirits Wholesalers of Southern California. Wenberg testified that, after the verbal final offer had been made, he contacted all eight employer-members of the association to notify them of the offer and was informed by the four employers represented by Papiano, including the Employer herein, that the offer was not acceptable to them. Wenberg informed the Teamsters locals of this fact when he met with them to work out the written version of Korshak's final offer, which the parties stipulated was presented to the Teamsters locals on October 2. 1981.3 The written document embodying Korshak's final offer, dated October 2, 1981, states that it is made on behalf of four specifically named employer-members of Wine and Spirits Wholesalers of Southern California, omitting the four employers represented by Papiano. The parties stipulated that Korshak's final offer was voted on and ratified by the salesmen employed by all eight employers on October 4, 1981.

The parties stipulated further that the following events occurred. On October 5, 1981, Papiano notified the Teamsters locals that Korshak's final offer was not made on behalf of the four employers represented by Papiano and therefore was not binding on those four employers despite the ratification. In response, on October 5, 1981, the Teamsters locals filed unfair labor practice charges against the four employers represented by Papiano and also began a strike against NDC Distributors, Inc., one of the four employers represented by Papiano. On October 6, 1981, the other three employers represented by Papiano, including the Employer herein, locked out all of their salesmen.4 On October 14, 1981, Papiano began negotiating with the Teamsters locals on behalf of these four employers. On October 19, 1981, Papiano made a final offer on behalf of these four employers, identified as Independent Liquor

The petition in Case 21-RD-1825 was filed on this same date.
The petition in Case 21-RD-1826 was filed 3 days later, on October 9, 1981.

Wholesalers of Southern California. On October 20, 1981, Papiano's final offer was voted on and ratified by the salesmen employed by these four employers, including the Employer herein. The Employer's salesmen at all four of its facilities are currently covered by this contract, which is effective from September 1, 1981, through August 31, 1983.

C. Conclusions

The Petitioners request that we decertify part of an existing unit. The Board will not normally direct a decertification election in a unit not coextensive with the existing unit. In this case, it is undisputed that the recognized unit, until at least September 30, 1981, was a unit of salesmen employed by eight employers, including all of the salesmen employed at the Employer's four facilities. However, the Petitioners contend that, as of October 2 and 9, 1981, when their petitions were filed, the existing multiemployer unit had been fragmented and destroyed, thus rendering single location units appropriate.

In Retail Associates, Inc., 6 the Board set forth its standards for allowing withdrawals from multiemployer bargaining units. The Board stated that, after actual negotiations based on the existing multiemployer unit had begun, it would not permit an abandonment of this unit absent mutual consent or unusual circumstances.7 Here, it is undisputed that no employer attempted to withdraw from the multiemployer association until long after actual negotiations on a multiemployer basis had begun. Rather, the four employers represented by Papiano participated actively in the negotiations as part of the multiemployer association right up until October 1, 1981, the day Korshak presented a final offer which was acceptable to the unions. Papiano had been present during all the negotiations through September 30, 1981, and had even presented a final offer on behalf of all eight employers which was rejected by the unions sometime before September 30, 1981. Therefore, any attempts to withdraw from the multiemployer association after September 30, 1981, would have had to be made either by mutual consent or as a result of unusual circumstances in order to have been effective under Retail Associates.

It is clear that the unions did not consent to the withdrawal of the four employers represented by Papiano until October 14, 1981, when they began negotiations with Papiano for a separate contract

covering those four employers. Thus, although Wenberg notified the Teamsters locals by October 2, 1981, that the four employers represented by Papiano did not find Korshak's final offer acceptable, the Teamsters locals still presented Korshak's final offer to the salesmen employed by all eight employers for ratification on October 4, 1981. Even after Papiano notified the Teamsters locals directly on October 5, 1981, that the four employers he represented did not consider this ratification to be binding on them, the Teamsters locals did not agree to their withdrawals from the association but rather filed unfair labor practice charges against the four employers and began a strike against one of them. The unions took no other action which would indicate consent to the withdrawals until negotiations for a separate contract covering those four employers began on October 14, 1981. Therefore, at the time these petitions were filed on October 2 and 9, 1981, the multiemployer unit had not been abandoned by mutual consent.8

In the absence of mutual consent, the Board has permitted employers to withdraw unilaterally from a multiemployer unit where the union has negotiated separate, final agreements with other employers on an individual basis after impasse has been reached in the multiemployer bargaining. In Typographic Service Co., the Board found that the union's conduct in negotiating such separate, final agreements with individual employers had "effectively fragmented and destroyed the integrity of the bargaining unit and thus created the 'unusual circumstances' authorizing unilateral unit with-drawal by the employers."9 Although it could be said that the multiemployer unit in this case was fragmented when the four employers represented by Papiano refused to be bound by Korshak's final offer, this fragmentation was created by the attempted unilateral withdrawals. Thus, it cannot be argued that the withdrawals were justified as a response to "unusual circumstances," since there were no "unusual circumstances" before these four employers attempted to withdraw from the multiemployer unit. We note further that the original multiemployer association was not destroyed by the attempted withdrawals. Rather, the bargaining continued on a multiemployer basis, with the same

^{*} See Campbell Soup Company, 111 NLRB 234 (1955). See also Bell & Howell Airline Service Company, 185 NLRB 67 (1970).

^{6 120} NLRB 388 (1958).

^{7 120} NLRB at 395.

⁸ While it might be inferred that the association consented to the withdrawal of these four employers since the written final offer of the association omitted their names from the list of employer-members, employers attempting to perfect untimely withdrawals must secure the consent of both the union and the multiemployer association. See *Teamsters Union Local No. 378 (Olympia Automobile Dealers Association)*, 243 NLRB 1086 (1979), remanded 672 F.2d 741 (9th Cir. 1982).

⁹ 238 NLRB 1565, 1566 (1978), cited with approval in Charles D. Bonanno Linen Service, Inc. v. N.L.R.B., 630 F.2d 25 (1st Cir. 1980), enfg. 243 NLRB 1093 (1979).

attorney representing the association during negotiations. Nor can Korshak's final offer be said to have fragmented or destroyed the unit, since this offer was made on behalf of the association. Thus, the ratified contract was not the result of separate negotiations with individual employers as in Typographic Service Co., supra.

Even if we were to find that the original multiemployer unit had been effectively fragmented and destroyed by October 2, 1981, when the unions received the association's final offer omitting the names of the four employers represented by Papiano, we would still find that the Employer herein was part of a multiemployer unit after that date, since the four employers represented by Papiano consistently functioned as a new multiemployer association immediately upon withdrawing from the original association and continuing through the negotiations of a final contract. Thus, we note that all four employers took the same position rejecting Korshak's final offer when polled by Wenberg on October 1 or 2, 1981; that Papiano reiterated their joint rejection of the original association's contract on October 5, 1981; that, in response to the strike against one of the four, the remaining three employers took concerted action and locked out their salesmen on October 6, 1981; that Papiano began negotiations with the unions on behalf of all four employers as a group on October 14, 1981; and that Papiano's final offer leading to a contract was made specifically on behalf of a new multiemployer association.

Therefore, we conclude that at all times relevant to the petitions herein the Employer was part of a multiemployer unit, either the original eight-employer unit or the new four-employer unit. Accordingly, we conclude that the single location units sought are not appropriate for decertification because they are not coextensive with the recognized multiemployer unit, and we shall dismiss the petitions.

ORDER

It is hereby ordered that the petitions herein be, and they hereby are, dismissed.